

# Challenges in Implementing a Competition Policy and Law: An Agenda for Action



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# ***Challenges in Implementing a Competition Policy and Law: An Agenda for Action***

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# **Challenges in Implementing a Competition Policy and Law: An Agenda for Action**

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**कट्स ✕ CUTS**

**CUTS Centre for International Trade, Economics & Environment**

D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India


Email: cuts@cuts.org, Website: www.cuts.org

**CUTS Africa Resource Centre**

4th Floor, Main Post Office Building,

Cairo Road, P.O. Box 37113, Lusaka, Zambia

Email: cutsarc@zamnet.zm

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Mukesh Tyagi

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# Preface

## Why a Competition Law & Policy?

Even though the field of competition law and policy is evolving rapidly and includes many different viewpoints on specific issues, it is being increasingly recognised that effective competition policy and law is important in shaping business culture. To understand the significance of competition policy for a developing economy, it is very important to know what do we actually mean by the term competition policy.

Governmental measures that directly affect the behaviour of enterprises and the structure of industry constitutes competition policy. It covers a whole raft of executive policies and even approaches, whereas the law is a piece of legislative enactment to regulate the marketplace, which can be enforced in a court of law.

Competition policy is an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and to regulate concentration of economic power detrimental to competition. It has different objectives in different countries but some major themes stand out. In most of the countries, it aims at promoting competition by discouraging anti-competitive behaviour. Freedom of trade, freedom of choice, access to markets, and achievement of economic efficiency to maximise consumer welfare are the other commonly expressed objectives of competition policy. The role of competition policy has also expanded in the last two decades to include curbing the adverse effects of government intervention in the marketplace.

While opportunities for anti-competitive behaviour may be limited in many sectors most of the time by fierce competition between firms, market conditions are constantly changing. It cannot be guaranteed that a particular market will remain very competitive and hence less vulnerable to anti-competitive practices in the long term. By being comprehensive, competition policy provides a ready-made, consistent framework for dealing with anti-competitive behaviour in any sector of the economy.

Introduction of a comprehensive competition policy can lead to significant advantages to business as well as consumers. For business, such a policy means fairness as it acts against anti-competitive practices that can drive efficient and well-run companies out of business. It ensures consistency because it is applied by a single authority working to a single set of published rules and a reduction in regulation since it is proactive, efficient and effective which avoids the need to commit manpower and time to devising new rules when new products or markets emerge.

For consumers, an effective competition policy & law leads to lower prices and improved services. An improvement in the coverage of competition law and a reduction in the time taken to remove barriers to competition mean a lot for the consumer.

Without a domestic competition law & policy, it may be difficult to control international anticompetitive practices like cartels etc, which restrict trade and adversely affect economic development. Developing countries may be hit doubly by the international cartels: on one hand, they may pay more for certain inputs than they would if the international market was competitive and on the other hand, their efforts to build a competitive industrial sector may be stifled (*see pg-15*).

However, it becomes very important to consider certain issues while drafting a competition policy because the high probability of even a desirable competition law & policy being implemented ineffectively by the competition agency due to various factors such as:

- Lack of political will;
- Lack of expertise;
- Inefficiency, and
- Resource constraints.

The pre-drafting process should focus first on the key problems in the economy. The most important bottlenecks that create impediments for the growth in domestic and export markets should be identified. A realistic assessment of the availability of financial and human resources should guide the purview of the law and the nature of the enforcement policies.

Institutions and their independence, separation of functions, adequate staffing and resource availability, and transparency are crucial for adequate competition law enforcement in any country. An agency that has little money and few people but an ambitious set of responsibilities should be careful in identifying its initial priorities. It is also significant to develop cooperative links with other agencies at the regional and the global level. Competition laws should be allowed to evolve and change to suit changing economic circumstances, while preserving the core objectives of competition policy.

Developing countries should take positive action and build their internal capacity in the area of competition policy, fostering the adoption of best practices, making full use of the expertise accumulated by established competition agencies and taking advantage of technical assistance, advisory and training services provided by multilateral institutions. A multilateral framework for cooperation on competition issues would better serve the interests of developing countries than the absence of such an agreement.

**Jaipur**  
**March 2002**

**Pradeep S Mehta**  
**Secretary General**



## Chapter-I

# Introduction

*The value of competition policy (CP) and competition law (CL) is well understood in some countries, particularly in the US, where anti-trust laws have long been recognised as a force for dynamism in the economy and the sharing of benefits between firms and consumers. However, their value is not well understood by policy-makers, producers or consumers in most developing countries.*

*CP is regarded with suspicion, as just another tool for transnational companies (TNCs).*

*Consumers in developing countries do not generally consider competition to be an issue of any relevance, yet it is consumers who have the most to gain from CP through lower prices, more choice and higher quality in the goods and services that they can buy.*

The value of competition policy (CP) and competition law (CL) is well understood in some countries, particularly in the US, where anti-trust laws have long been recognised as a force for dynamism in the economy and the sharing of benefits between firms and consumers. However, their value is not well understood by policy-makers, producers or consumers in most developing countries. In many of these countries, competition is an issue that has come to the fore only because of its inclusion in the agenda of the World Trade Organisation (WTO). At the insistence of the European Union (EU), it was included in the Doha Ministerial Declaration, November 2001, and the member-states committed to begin negotiation on competition after the next Ministerial meeting in two years' time.

### **General Perceptions**

CP is regarded with suspicion, as just another tool for transnational companies (TNCs), backed up by the governments of their rich home countries, to break into the markets of poor countries. CP is thought to benefit TNCs, which have inherent advantages because of their scale and scope, over domestic firms, which will be wiped out in the heat of international competition.

### **Consumer as a Beneficiary**

Consumers in developing countries do not generally consider competition to be an issue of any relevance, yet it is consumers who have the most to gain from CP through lower prices, more choice and higher quality in the goods and services that they can buy. This negative perception has held back an open and informed debate on the benefits of competition policy and law at the national level as well as at the international level.

However, a well-implemented competition policy may raise efficiency in the economy, spurring local firms to greater efficiency and ensuring that the benefits of economic growth in the economy are shared with people. A competition policy, rather than a policy of liberalisation, is a policy to balance the risks and constrain the negative effects of liberalisation, while providing for a predictable business environment.



*The negative perception can be changed through the exchange of information and experience between developing countries, as well as from developed to developing countries.*

*A short survey on participants' perceptions on CP was conducted during a symposium held in Geneva on "Competition Policy and Consumer Interest in the Global Economy" on 12-13 October 2001.*

*The seminar discussions took up numerous case studies to reinforce the arguments that were being made.*

## **Information Sharing**

The negative perception can be changed through the exchange of information and experience between developing countries, as well as from developed to developing countries. CUTS assists this information-sharing process by organising events and publishing materials to raise awareness and break down biases on this central consumer issue in developing countries. (See Annexure-I for a list of CUTS publications on competition policy and law)

## **About the Symposium**

A short survey on participants' perceptions on CP was conducted during a symposium held in Geneva on "Competition Policy and Consumer Interest in the Global Economy" on 12-13 October 2001. The one-and-a-half-day event was organised by CUTS and supported by the International Development Research Centre (IDRC), Canada. The symposium was addressed by international experts and practitioners representing different stakeholder groups: consumer organisations, NGOs, media, academia, policy-makers etc., having diverse views regarding CP. An audience of **60 people from 30 countries<sup>1</sup> from all over the world**, including representatives of Geneva trade missions, UNCTAD, WTO, European Commission etc., participated in the symposium.

## **Survey Results of the Symposium**

The survey results showed:

- **96%** of the respondents were convinced that competition policy and law at the national level are important for consumer welfare,
- **80%** of the respondents said that the seminar had had an impact on their views, while
- **25%** of the respondents saying that their views had changed completely on this question as a result of the discussions at the seminar.

**All** the respondents except one were of the view that events of this nature were valuable, which demonstrates how effective an open discussion can be in overturning preconceptions. (See Annexure-II for the complete survey results)

## **Discussions at the Symposium**

The seminar discussions took up numerous case studies to reinforce the arguments that were being made. The case studies make it easier for those who are not familiar with the complexities of competition law and policy to understand how laws operate in real

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1 Argentina; Bangladesh; Bolivia; Brazil; Canada; Chad; Egypt; Fiji; Ghana; Hong Kong; India; Indonesia; Kenya; Malawi; Malaysia; Nepal; Pakistan; Panama; Poland; Senegal; Singapore; South Africa; Sri Lanka; Switzerland; Turkey; United Kingdom; West Indies and Zambia

life. Even in countries where consumer awareness is not very high, consumers are certainly sensitive to the price and the quality of the products that they purchase, and when consumers can see how the operation of a cartel raises the prices they have to pay, the relevance of competition policy can be easily demonstrated.

*In developing countries, some of the most striking examples are in services.*

In developing countries, some of the most striking examples are in services. In **Malaysia**, the privatisation of the road network amounted to a transfer of the existing government monopoly to a monopoly in the private sector. Toll prices shot up and badly needed investment in the road network did not take place. This led to public protest and, eventually, the sector was re-nationalised. Consumer representatives felt that an active CA would be particularly valuable in advocating better privatisation.

In **Peru**, consumers are aware of and supportive of the competition regime after a series of cartel cases in domestic consumer product industries. These included flour and chicken, which allowed the CA to demonstrate the direct impact that anti-competitive behaviour has on consumers through higher prices. These kinds of cases show how competition policy serves to benefit the consumers of developing countries.

Rapporteur of the symposium: Phil Evans of Consumers Association, UK, has produced an analytical report covering the substantial points of the discussions that took place. A detailed report of the proceedings is also available on the website, <http://cuts.org/comp-event-geneva.htm>.

*This report has been prepared for easier and better understanding of the event, which took place, and its outcome in particular.*

This report has been prepared as a short paper for easier and better understanding of the event, which took place, and its outcome in particular. It has been laid out through chapters in an easy format. We hope that this publication will assist people in understanding the several dimensions of competition law and policy, as was debated at the symposium. Comments and clarifications are welcome, and can be sent to [cuts@cuts.org](mailto:cuts@cuts.org).

CUTS staff members: Olivia Jensen, Nupur Mehta, Nitya Nanda and Anjali Bansal have produced this report.

## Why Should Countries Introduce National Competition Law?

*Many countries do not have a competition law (CL). There are two possible reasons for this. The first one is that there is a lack of awareness about CL in the country or a lack of capacity to design and enact the law. The second one is that it is either believed not to be necessary or there is active opposition to it.*

Many countries do not have a competition law (CL). There are two possible reasons for this. The first one is that there is a lack of awareness about CL in the country or a lack of capacity to design and enact the law. The second one is that it is either believed not to be necessary or there is active opposition to it. Such opposition may come from policy-makers, but is more likely to come from domestic businesses.

The first problem can be tackled through trainings and awareness generation. While, the second set of reasons, the belief that CL is unnecessary or positively harmful, need to be considered seriously before they can be put to rest.

### Arguments against implementation of CL

#### *The country has open trade policy*

Open trade policy means that in most tradable sectors, domestic firms are forced to compete with imports, forcing them to stay competitive. However, many products in the economy are not traded, particularly services, and, hence, there is no competition from imports. The case of **Hong Kong** demonstrates the kinds of competition problems that a very open economy can face.

*Open trade policy means that in most tradable sectors, domestic firms are forced to compete with imports, forcing them to stay competitive. However, many products in the economy are not traded, particularly services, and, hence, there is no competition from imports.*

As Ron Cameron of Hong Kong's consumer association, argues, an open economy is not adequate to ensure competition and a fair distribution of gains between consumers and producers because even in a very open economy like Hong Kong's, there are large sectors which are not traded or where government policy effectively supports anti-competitive practices. However, the Hong Kong Consumer Council is represented on the Hong Kong Government's Advisory Group on Competition Policy and have been able to raise issues of concern. They have also been able to initiate some changes, but their efforts would be greatly strengthened by the introduction of a CL.

### ***The country has an effective competition policy without having competition law***

*It is sometimes argued that countries can create a competition culture in the economy without having a competition law. However, there are good reasons for having a competition law to provide legal backing to any existing competition policy.*

CL is only one element of CP. Competition policy in many countries is not a unified policy. It is made up of elements of sectoral policies, industrial policy, policies governing the roles of the public and private sectors in the economy, intellectual property law and policy, trade policy and consumer protection law and policy, etc. It is sometimes argued that countries can create a competition culture in the economy without having a competition law.

However, there are good reasons for having a competition law to provide legal backing to any existing competition policy. A law provides for consistency and transparency and can institutionalise many good practices to ensure that they are sustained, even in different economic circumstances or under a less supportive political regime. Importantly, it provides a point of reference and redress for consumers, giving a 'bite' to consumer policy.

This debate on the need for CL has been a point of contention. In **Malaysia**, for example, liberalised trade and other pro-market policies have ensured relatively high levels of competition in most sectors of the economy. However, one area in which consumers have suffered as a result of the absence of such a policy has been the badly designed and implemented privatisation programme, particularly in key utility sectors. In several cases, a government monopoly was transferred intact to the private sector to become a private monopoly. Consumers suffered from dramatic price rises and drop in the quality of services that occurred in several sectors.

A CA, supported by an active consumer movement, could have played a vital advocacy role in structuring the newly privatised industries to create and sustain effective competition and could have provided an avenue for the redressal of aggrieved consumers. In his presentation, Ramdass Tikamdass of FOMCA, the **Malaysian** consumer federation, emphasised the essential role that the CA can and should play in advising governments in developing countries as they commercialise their utility sectors.

*It is sometimes argued that small countries do not need to have a competition policy, especially if they have no industrial base.*

### ***The country is very small and does not have an indigenous industrial base***

It is sometimes argued that small countries do not need to have a competition policy, especially if they have no industrial base. Ratnakar Adhikari of ProPublic, Kathmandu, **Nepal** pointed out, with reference to the case of Nepal, that while small countries could rely, to some extent, on the institutional mechanisms of their large trading partners to tackle competition concerns involving foreign companies, national competition policy would still be useful

to deal with anti-competitive practices in retailing and other non-traded service sectors.

A case in **Bhutan** (population: 100,000) is an interesting example in this context. Hindustan Lever Ltd. (HLL) was operating in Bhutan through just one wholesaler: The Tashi Group of Companies. To regulate the monopoly in distribution, the Ministry of Trade and Industry (MTI) insisted that HLL appoint a parallel distributor. But, HLL's response was evasive, on the grounds that they can't find another firm, which has adequate experience and capital.

Finally, the MTI suggested Food Corporation of Bhutan (FCB), a government company, which had both capital and a wide distribution network. Yet when HLL did not respond, MTI threatened that it would cancel Tashi's license to operate as HLL's distributor. The threat worked and HLL soon appointed FCB as its second wholesaler. In turn, it was HLL which gained hugely. FCB soon multiplied HLL's business in Bhutan three fold.

### ***Developing countries lack sufficient resources***

*Developing countries, especially small economies and LDCs, may not have sufficient financial and human resources to enact CL and man an agency to oversee its implementation.*

Developing countries, especially small economies and LDCs, may not have sufficient financial and human resources to enact CL and man an agency to oversee its implementation. Resource constraints may pose problems for small countries when trying to set up their own competition and consumer protection regimes and one solution could be for small countries to consider a regional approach to institution-building. Another possibility would be to combine the CA with the consumer protection and intellectual property regulatory agencies, as in Peru and other South American countries.

The special needs of small countries may be reflected in the scope or provisions of the law, for example, in whether or not the law needs to contain merger control provisions. Merger control is very costly in terms of time and skills for a CA and may not be worthwhile in a small country. However, small countries are also more vulnerable to the acquisition of domestic firms by large foreign firms, which can radically reduce competition in the relevant market and have a major impact on domestic consumer welfare. Thus, some provision for takeovers may be useful.

In all cases, CP and CL should be realistic: many small countries have laws that look excellent on paper, but are either not appropriate to the specific needs of that economy or require a level of capacity that the country simply does not have.

## Arguments: Why CL is Harmful?

### *Allows foreign firms to come in and take over domestic firm*

The effect of foreign entry into the market depends on the capabilities of domestic firms. If anything, competition law provides some protection to domestic firms from foreign firms that use anti-competitive practices to capture the national market.

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In some cases, TNCs are able to supply products at lower prices than domestic firms because of economies of scale, better management and higher levels of efficiency in the production process. If this is the case, then consumers benefit unambiguously from the entry of foreign firms. However, in some cases, firms enter the market with artificially low prices so that they can capture market share from domestic firms, drive these firms out of business and raise prices after having achieved a monopolistic position. This is a case of predatory pricing, a strategy that is also often used by incumbent monopolists to maintain their position. Predatory pricing is a very difficult issue to judge, but CL at least provides an avenue for domestic firms to protect themselves from unfair competition.

There is also a risk that trade liberalisation may lead to defensive anti-competitive actions by domestic firms, as has been the case in some industries in **South Africa**. Astrid Ludin of the South African Competition Commission points out several examples of this in South Africa, including the sugar industry and the retail banking sector which the CA has been able to challenge. In general, the entry of efficient foreign firms into the market should give a boost to competitiveness in domestic firms, with benefits to the economy as a whole.

### *Prevents domestic firms growing into world-class companies*

From a different angle, an objection that is often made to CL in developing countries is that a tough regime for the control of mergers and acquisitions (M&As) will stifle the growth of potentially world-class companies that have not yet grown to a sufficient size to compete with TNCs in global markets. There is no reason for this to be the case. A sophisticated CL looks at competition in the relevant market when considering a merger. If a firm is competing primarily with foreign firms for an international market, then this will be taken into account and the merger will be allowed to go ahead.

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In 2001, for example, the **New Zealand** Competition Authority permitted a merger between the country's two largest dairy companies, allowing them to form a domestic monopoly on the

grounds that the firms were in strong competition with foreign firms and the consolidation was necessary to maintain competitiveness. This objection can be tackled by carefully drafting, firstly, the criteria for consideration of the merger by the CA and, secondly, the criteria against which the merger is judged.

In many countries, small, medium and micro-enterprises are thought to play a vital role in economic development and there is concern that such firms are not capable of competing in global markets without extra support from the government. Some forms of support, such as preferential financing and support for collaborative research and development may conflict with CL. However, the government can provide specific exemptions for these firms in the national law where this fits in with the national development strategy.



## What Form Should National Competition Law Take?

On the basis of the available evidence, including the experiences of developing countries that have adopted a competition law, it is strongly recommended that other countries draft and implement their own competition law.

*Every country needs to tailor CL to its own specific set of needs and conditions. The most important factor is that the law should be realistic.*

### ***Different model for different countries***

This is not to suggest that ‘one size fits all’ and that countries should adopt either the model used by a neighbour or one of the models drafted by an international body such as those formulated by the UNCTAD and the OECD. On the contrary, every country needs to tailor CL to its own specific set of needs and conditions. The most important factor is that the law should be realistic. There is no point in a developing country enacting a state-of-the-art CL with provisions for screening a high proportion of M&As and with a large and active CA to administer it.

*It may be practical to consider cases only when anti-competitive practices are brought to the attention of the CA, whether these are in broad or narrow geographical markets.*

### ***How could resource constraints be managed?***

In most developing countries, the resources, both financial and human, are limited and may not be available to run such an Agency. For such countries, it may be practical to consider cases only when anti-competitive practices are brought to the attention of the CA, whether these are in broad or narrow geographical markets. Introducing a law that cannot be properly implemented is not just futile but may be counter-productive. If the CA is seen not to be fulfilling its mandate, then people may lose faith in the effectiveness of CL as a whole.

### ***How should the provisions look like?***

Provisions should be appropriate as well as realistic. There is scope for exceptions and exemptions in CL and countries should make careful use of these. If, for example, the national development strategy of a country includes policies to promote small and medium-sized enterprises, disadvantaged regions or groups, then these regions could be exempted from some of the provisions of CL.

*There is scope for exceptions and exemptions in CL and countries should make careful use of these. However, exemptions should be included with caution.*

However, exemptions should be included with caution. At the stage when the legislation is being drafted and debated, many interest

*Public sector enterprises (PSEs) are exempted from the CL in some countries under the paradigm that 'the king can do no wrong'.*

groups can be expected to lobby for their exclusion from the law. It is more than likely that this is not based on any sound arguments of economic efficiency or consumer welfare, but is simply to prolong the protection of inefficient businesses from competition.

It may also be the case that a country at an early stage of development cannot be sure what kind of exceptions it might want to have in the future. A broad clause allowing exceptions to be made "in the public interest" will allow flexibility, but runs the risk of being exploited by special interests.

### ***Application of CL to all the sectors***

Public sector enterprises (PSEs) are exempted from the CL in some countries under the paradigm that 'the king can do no wrong'. Like in the case of **India**, the Monopolies and Restrictive Trade Practices Act, 1969, did not include PSEs. However, in 1991, the Act was amended to make it applicable to the PSEs.

*The specification of consumer interests will give the law a different emphasis.*

In general, exemption of PSEs from CL runs counter to the aim of trying to create a competition culture within the country. Bringing the PSEs within the scope of the law would allow consumers to demand the same standards of efficiency and service from the public sector as they do from the private sector.

### ***Economic efficiency vs. Consumer welfare***

One of the key debates in CL is whether the primary aim of the legislation should be to promote economic efficiency or consumer welfare. While these two aims may often coincide, the specification of consumer interests will give the law a different emphasis. Specific mention of consumer welfare may help to ensure that consumers and their representative groups have an active role in the implementation of the law and direct the attention of the authority to cases of consumer interest as well as to cases brought by competing businesses.

*The role of consumer in CL should also include the right of consumer organisations to bring complaints to the CA and to be included in the consultative process for policy questions, especially in the case of developing countries, which suffer from the problem of resource constraints.*

### ***Important role of consumer organisations***

On the basis of CUTS research and the conclusions of the Geneva seminar, there was a general recommendation that consumer welfare should be explicitly mentioned in the legislation. The role of consumer in CL should also include the right of consumer organisations to bring complaints to the CA and to be included in the consultative process for policy questions, especially in the case of developing countries, which suffer from the problem of resource constraints. This would not only reduce the burden on the state but would also facilitate control and check on the anti-competitive practices.

Putting the consumer at the heart of the legislation makes it more likely that the benefits of CL will be shared widely.

### ***International dimension and cooperation***

The international dimension of competition challenges is becoming more prominent. As trade and investment regimes are liberalised in most developing countries, the inflow of foreign products and companies creates new challenges. The law should take account of this and, in particular, should allow specifically for co-operation and information sharing with other competition authorities. It is possible that the practice of co-operation may be built up anyway, but it will be given a boost by inclusion in the legislation itself.

*The law should allow specifically for co-operation and information sharing with other competition authorities.*

## How to Make the Competition Law Effective

*The effectiveness of the CL will depend on the extent to which it is co-ordinated with other policies and, consequently, the most direct overlap will be with sectoral regulators governing key utility sectors, which usually have been creating and promoting competition in the sector as part of their mandate.*

There is no guarantee that good legislation will meet its aims. Creating a competition culture depends on effective implementation and a supportive policy environment. There are a number of factors that contribute to but have the potential to undermine a good CL.

### *Relation with other policies*

As mentioned above, CL is just one element of competition policy. The effectiveness of the CL will depend on the extent to which it is co-ordinated with other policies and, consequently, the most direct overlap will be with sectoral regulators governing key utility sectors, which usually have been creating and promoting competition in the sector as part of their mandate. The boundaries and roles of the sectoral regulators and the CA are difficult to define and in many countries the issues remain unresolved. Ideally, the sectoral regulators would concentrate on the structure of the sector, trying to create a competitive market so that the regulator's day-to-day role in setting prices would diminish over time.

The role of the CA would be to deal with cases of abuse of dominance when they arise. However, it is likely that sectoral regulators will continue to play a hands-on role for the foreseeable future. To prevent potential conflict and confusion, the CL and the sectoral laws should specify clearly the circumstances under which the CA could investigate the behaviour of companies in the regulated sector. The legislation should also define a consultative role for the CA in the development of sectoral policies.

### *Good leadership*

Experience from many countries shows that the effectiveness of a CA fluctuates with the quality of the Authority's leadership. This is true in the US, where the Federal Trade Commission was transformed into an active trust-busting body only in the 1970s with a change in leadership and a boost in political support rather than a change in the law. It is extremely helpful if the leader of a new CA has personal prestige, as this will give the institution itself higher standing in the political arena and also in the eyes of the public. It is also helpful if the leader has good political contacts that can assist him in taking up more controversial cases.

*Experience from many countries shows that the effectiveness of a CA fluctuates with the quality of the Authority's leadership.*

*High level political backing will be necessary to ensure that there is no political interference in the work of the CA and its decisions are carried out.*

### ***Political support***

As an extension of the point above, political support is crucial to the success of CL. This will enable the passage of legislation and probably provide more independence and resources for the Authority that will implement the policy. Wide publicity about the CA and its support from key politicians will make it more difficult for the politicians to backtrack on their commitment under pressure from special interest groups. Political backing will raise the profile of competition issues and should create awareness in the public of the issues involved through the media.

In the course of its work, the CA will have to take on entrenched domestic interest groups. Many of these groups will have benefited from protection from competition in the past from domestic or foreign sources and continue to be very influential in the political system. High level political backing will be necessary to ensure that there is no political interference in the work of the CA and its decisions are carried out.

### ***An active consumer movement***

A resounding conclusion from the Symposium and from CUTS' in-depth research on CP in seven developing countries (the "7-Up Project")<sup>2</sup> is that an active consumer movement makes a significant difference to the effectiveness of CL. Empowered consumers and representative organisations will bring anti-competitive practices, including abuse of dominance and collusion, to the attention of the CA. They will also act as a positive pressure to counteract the opposition of inefficient businesses to the successful implementation of the CL.

*An active consumer movement makes a significant difference to the effectiveness of CL.*

Many consumers are not aware of the relevance of competition policy. Therefore, consumer organisations have an important role in demonstrating the importance of CP by connecting the policy with people's everyday experiences and products with which they are familiar. Consumer organisations, therefore, have a very important role to play in raising awareness and stimulating interest among consumers about what CP is for and how it can be used. They can also put pressure on the government to enact a Consumer Law, where one does not already exist.

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2 The CUTS Centre for International Trade, Economics & Environment (CITEE) is implementing a two-year research project entitled "The 7-UP Project". This project involves a comparative study of the competition regimes of seven developing countries in the Commonwealth with the aim of strengthening their competition laws. This initiative is supported by the Department for International Development, UK. The countries covered under this project are: India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia. For more details please visit <http://www.cuts.org/7-up/project.stm>

## What are the International Competition Challenges

Very few people in developed and developing countries appreciate the international dimension of competition policy. However, international competition issues can have a great impact on national economic development. There are also direct results for consumers in terms of higher prices, poor standards and restrictions on the products that they have access to. The following section identifies some of competition policy's international dimensions.

### *International cartels*

As Rob Anderson of the **WTO** points out, consumers in both developing and developed countries suffer great losses at the hands of international cartels. While international cartels, like the vitamins cartel, have been convicted and prevented from operating in the US and Europe, they are still operating in developing countries. The cartels have simply migrated towards those jurisdictions where they can get away without penalty. Consequently, developing countries are now suffering more than ever as a result of these conspiracies.

*The harmful effects of cartels are two-fold: on the one hand, there are the visible results like higher prices and reduced supply; and on the other hand, with even more serious implication for economic development, cartels use predatory tactics to exclude developing country producers from their markets.*

The potential gains for developing countries have not been quantified but are likely to be huge. This is confirmed by the amount of money that corporations are willing to pay to settle legal cases relating to their operations and avoid conviction. According to an estimate by the World Bank studies<sup>3</sup> on the international cartels, the value of “cartel-affected” imports to developing countries was **US\$81.1bn** from just 16 cartels during 1990s. It is clear from the magnitude of these figures that cartels have adversely affected a significant portion of the trade, thereby affecting the trade balance and consumption of developing countries.

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3 Background Paper for the World Bank's World Development Report 2001, “Private International Cartels and Their Effect on Developing Countries” by Margaret Levenstein and Valarie Suslow.

country producers from their markets. The harmful effects on development are exacerbated by the fact that many of these cartels exist in industrial input industries.

CAs in developing countries do not have the resources to gather information on the effects of cartel operations in their markets, let alone the ability to gather enough evidence to convict a cartel. In this matter, the co-operation of developed countries' CAs is crucial. Both **Australia and Canada**, for example, have relied on information from the US to tackle the vitamins cartel.

*This can result in unhealthy concentration of the market and create a position of dominance for a firm, which may later be abused.*

### **Cross-border M&As**

A rising proportion of foreign direct investment (FDI) comes through M&As of existing firms in the host country. This is particularly the case in developed countries, but is also the case in some developing countries. This can result in unhealthy concentration of the market and create a position of dominance for a firm, which may later be abused.

When restrictions on FDI are lifted, it is impossible for a developing country to prevent the acquisition of a domestic competitor by a powerful multinational that is already importing to the market, if the country does not have a CL. The comparative size of the TNC and the national economy of a developing country mean that M&A activity can have a serious impact on the economy as a whole, in negative as well as positive ways.

The box below demonstrates how active implementation of CL can be used by a developing country to prevent a TNC from attaining a position of dominance in the domestic market.

#### **The Acquisition of Chilanga Cement of Zambia by Lafarge**

Lafarge, the international cement giant, has an active global acquisition-strategy that is leading to increasing concentration of the industry at the global level, as well as in particular countries and regions. The cement industry world-wide is notorious for its anti-competitive tendencies and is becoming increasingly concentrated. Lafarge, like other cement companies, is trying to secure its hold on regional markets through this strategy.

The acquisition of Chilanga further strengthened Lafarge's position in the regional market. The absence of an effective competition regime in other countries meant that only the Zambia Competition Commission (ZCC) considered the case. In order to prevent its anti-competitive effects, the ZCC imposed conditions on the merger, which the company met. This case demonstrates that an active CA with sufficient resources and a CL with provisions for severe punishments such as prison terms can successfully take on a multinational company to the benefit of the whole regional market.



Developing countries may also be affected by M&A activity that takes place outside their territory. The trend of mega-mergers between the US and European firms has generated much concern that competition will be stifled around the world. In some cases, subsidiaries of the merging firms may share most of a developing country's market, implying that the merger of the subsidiaries in that market would create a near monopoly.

*The CA in each market can subject the transaction to its own mergers-approval process and may impose conditions on the firms' subsidiaries operating in the country.*

The CA in each market can subject the transaction to its own mergers-approval process and may impose conditions on the firms' subsidiaries operating in the country. In a recent case, the Competition Commission of **Zimbabwe** authorised the merger of the local businesses of British American Tobacco (Zimbabwe) Limited and Rothmans of Pall Mall (Zimbabwe) Limited, after imposing certain terms and conditions.

The imposition was based on the anticipated benefits of the merger, as promised by the merging parties, and was designed to alleviate the adverse effects of the merger. The merged company was required to consult the Commission every time it proposed a price increase; the merging parties should allow competitors to operate in related downstream industries and should give an undertaking that the product range, quality and services will not deteriorate.

Let us take another example of Unilever Brooke Bond. After the merger of Lipton and Brooke Bond, Unilever took-over Brooke Bond-Lipton the world over. The Monopoly Control Authority of **Pakistan** allowed this merger on the condition that Unilever would take up tea plantations in Pakistan, which was not being done so far. Unilever agreed to do so and the merger was allowed.

However, if the firms are only exporting their products, it will be impossible for the CA to impose conditions. The difficulty for developing countries lies in their lower levels of awareness and their lack of resources to conduct the extremely costly and demanding analysis that the merger approval process requires.

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Competition concerns are particularly strong in certain industries of great importance to some developing economies that are dominated by a small number of TNCs. These include the telecom sector and the tourism industry.

While most developing countries are extremely keen to attract foreign direct investment in these sectors, CA must be vigilant in watching out for anti-competitive practices by foreign entrants at the national level. The CA will want to consider the TNC's potential for market dominance when considering its acquisition of a domestic firm.

### ***Anti-competitive practices by TNCs***

The size and scope of TNCs makes it possible for them to engage in a variety of anti-competitive practices, to the detriment of developing economies and to consumer welfare. These include tied-selling agreements and restrictions on the activities of subsidiaries (e.g. whether they are allowed to export, and where).

*The size and scope of TNCs makes it possible for them to engage in a variety of anti-competitive practices, to the detriment of developing economies and to consumer welfare.*

Many of the restrictive practices relate to intellectual property (IP), in the form of technology, brands, etc., which is a multinational's key asset. For example, IP licensing agreements among competitors, such as patent pooling and cross licensing, can act as vehicles for the establishment of cartels. To tackle these, it may be useful for the national CL to contain particular provisions dealing exclusively with intellectual property.

### ***Dumping and anti-dumping actions***

Regional economic co-operation can lead to dumping, if a company operates as a monopoly in one country and is, therefore, able to export at artificially low prices. Looking at the experience of **Argentina**, Jorge Bogo, former President of the CA, pointed out that the rapid liberalisation of trade that took place with the creation of Mercosur drove greater co-operation and co-ordination on competition in the region.

*Regional economic co-operation can lead to dumping, if a company operates as a monopoly in one country and is, therefore, able to export at artificially low prices.*

Countries were concerned about the operation of regional cartels and foreign goods being dumped onto their domestic markets. Anti-dumping is, of course, primarily a trade issue and dealt with by trade ministries or authorities rather than by the CA. However, conflicts may arise between the two as consumers benefit from lower prices that may harm domestic industries. Ideally, a regional competition policy would obviate the need for anti-dumping actions within a regional trading bloc.

## How to Deal with International Competition Challenges

In order to face these challenges, developing countries require, in the first place, a national competition law. This would allow them to investigate anti-competitive behaviour by the TNCs operating in the domestic economy and to impose punitive or structurally corrective measures as necessary.

If the law includes merger-approval procedures, then the national CA would also be able to assess the impact of a merger between two foreign firms or between a foreign firm and a domestic firm and to impose conditions on the merger as necessary (*see pgs. 17-18*), as the Zambia Competition Commission, Competition Commission of Zimbabwe and the Monopoly Control Authority of Pakistan did in the case of Lafarge, BAT-Rothmans and Unilever Brooke Bond respectively.

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In some cases, the existence of the law, especially if it has provisions for criminal sentences, can have a preventive effect and reduce the incidence of abuse by firms without the need for investigation or prosecution.

However, developing-country CAs do not, in general, have the resources or the experience to tackle international competition challenges. Cartel cases are notoriously difficult to prove, even for the American and European authorities in dealing with companies based in their territories. Cartel cases will, therefore, be almost impossible for a developing country to handle, as it is not possible to set up microphones in the boardroom of an American company.

In **India**, CUTS tried to do some preliminary investigations to find out whether the subsidiaries of the big pharma companies, like Rhone Poulenc, BASF, Hoffmann La Roche, etc., which have been involved in the international vitamin cartel, have also indulged in selling bulk-vitamins in India and the extent of overcharging thereof, if any. An effort was made to get an undertaking from the CEOs of these companies to the effect that they have not been involved in such activities. All companies, except Rhone Poulenc, responded.

Interestingly, Rhone Poulenc had escaped criminal punishment under an amnesty deal by supplying the US prosecutors with the evidence that cracked the cartel. Following that, CUTS asked the Director General (Investigation and Registration) of the Indian competition authority to launch investigations. However, no further investigation was done by them and the matter was dropped, without any substantial reasons.

*A developing country could be allowed to make a special submission on the impact in their market to avoid the case being considered all over again in their jurisdiction, saving the company time and money.*

Developing countries need to explore several ways to gain access to the information that they need and build the internal capacity to deal effectively with international competition challenges.

### ***Ad hoc solutions***

One possibility is to submit evidence for cases that are being brought in other countries. The CL of a country only applies to company activities that affect the domestic market, which means that exports are excluded. However, a developing country could be allowed to make a special submission on the impact in their market to avoid the case being considered all over again in their jurisdiction, saving the company time and money.

In the case of a cartel, the harm caused to the other country could be included in the calculation of fines and in the case of a merger, extra conditions could be imposed on the firms to ensure that competition was not restricted in the other market. This kind of involvement would necessarily be ad hoc and rely on the willingness of developed country courts/CA to accept evidence. This would vary from case to case. It would also rely on vigilance on the part of the developing country CA, which would have to keep a close track of the activities of other CAs to take part in the proceedings, and might require changes to legal doctrine or law in some countries.

*Developing country authorities can simply make a request to the CA of another country for information about a company or about how the authority went about conducting an investigation.*

### ***Informal co-operation***

This kind of co-operation does not rely on any agreement being signed by national governments and is carried out at the level of the CA. Developing country authorities can simply make a request to the CA of another country for information about a company or about how the authority went about conducting an investigation. The latter will be of great use to the developing countries in building up the capacity of their CAs.

A drawback is that much of the information about companies is considered to be 'business sensitive' and is, thus, confidential. Other authorities will generally not be able to share this information, but an important exception is information about the activities of cartels and so this could be passed on.

Co-operation with other developing countries may also be very useful, as these countries are likely to have faced similar types of problems. Although they may have less experience with CL, their experience may be more relevant.

### ***Formal co-operation***

*A formal agreement strengthens the informal co-operation that already exists by raising the profile of co-operation and providing an institutional framework.*

Once authorities have some experience of working together and are satisfied with each other's ability to keep information confidential, they may move to a higher level of co-operation, formalised in an agreement between the two governments. Competition agencies in the US, Canada, Australia, the EU and Japan are linked by a network of agreements on co-operation.

Developing countries have, by and large, not been party to such agreements for two reasons. One, current agreements exist between agencies with comparable levels of experience and information and, two, the perception in many developed countries that the authorities in developing countries might have difficulty in keeping confidential the business information passed on to them. One of the few exceptions is the agreement between Brazil and the US.

A formal agreement strengthens the informal co-operation that already exists by raising the profile of co-operation and providing an institutional framework. It may not, in itself, make any difference to the depth of contact and information sharing between the authorities.

*Small countries may find that they can achieve economies of scale and minimise the incidence of anti-dumping actions through regional competition arrangements.*

### ***Regional approaches***

Small countries may find that they can achieve economies of scale and minimise the incidence of anti-dumping actions through regional competition arrangements. **Caricom**, the economic co-operation body of the Caribbean economies, is one example (See box). COMESA, the regional economic body for Eastern and Southern Africa is also working on developing a regional CP. In this case, the motivation has come from within the region itself from concerns that TNCs were dividing up the "regional pie" at the expense of COMESA consumers and producers and as a result of the entry of South African firms into other regional markets.

## Caricom

The region is currently trying to put in place an over-arching regional CA, as envisaged in the regional agreement. The driving logic behind this has been the need for an economic area to have a common competition regime and concerns arising from the entry of powerful TNCs into the region.

Apart from Trinidad and Tobago, where the economy is oil-based, the Caribbean economies are focused on tourism, a sector in which there is a small number of dominant international players. This makes the Caribbean economies vulnerable to abuse of dominance by these companies, which a regional CA may deal with, whereas a national authority may not.

In the Caribbean, as elsewhere, privatisation took place before an adequate competition regime had been put in place as a result of ignorance and external pressure. In the telecommunications sector, for example, TNCs have gained monopolies in some of the economies. A regional CA would be able to consider the impact of an acquisition on all the economies and would prevent powerful TNCs from playing the states off against each other to secure special privileges.

## What are the Pros and Cons of a Multilateral Competition Policy

Given the limitations of the approaches mentioned above, there is a good case for drawing up a multilateral competition policy (MCP) to meet international competition challenges. There are also a number of drawbacks to an MCP, particularly in the context of the WTO.

Views on multilateral competition policy were quite divided, according to our survey of seminar participants:

**Sixty percent** of the respondents believed that some kind of MCP would benefit developing countries and their consumers, while **20 percent** thought otherwise.

*Views on multilateral competition policy were quite divided, according to our survey of seminar participants.*

The rest **20 percent** were undecided on the issue, reflecting the absence of in-depth research on its projected effects on developing countries.

Just over a half (**56 percent**) of the respondents also said that they felt developing countries should support an MCP at the WTO, but there was a slightly higher proportion of negative responses to this question: **28 percent** thought that developing countries should not support it, while the remaining **16 percent** were undecided.

### *Diverse views of the participants*

It may be noted, however, that quite a few of them were not opposed to MCP as such, but feel that the developing countries are not yet prepared to participate effectively in any negotiations at an international forum. Moreover, it was observed during the debate at the seminar that many of the participants from the developing countries do not have full confidence in the WTO system and also that whenever the issue of MCP comes up for discussion, they link it to the present discussion on the subject at the WTO. Thus, it may be said that a much higher proportion of the participants are probably in favour of an MCP, but the same is not properly reflected in the survey due to the prevailing circumstances.



Again, about **half** of the audience said that their views on MCP had changed or has been reinforced as a result of the symposium. About a **quarter** of the audience said their views had changed, while **another quarter** said their previous view had been strengthened and the remainder said their convictions had remained the same.

*Some developing countries object to an MCP because they perceive it as yet another tool for market access which will benefit multinationals at the expense of consumers and national economies.*

A notable aspect of this change has been that it has been one-sided throughout. Among those whose views did not change, **about half** (28 percent of the total audience) still feel that there is no need for an MCP, especially at the WTO. The **remaining** (24 percent of the total audience) were already in favour of an MCP. Those whose views were changed or strengthened are all in favour of an MCP, but not necessarily at the WTO framework. Moreover, those who are not sure about the benefits of an MCP now were mostly either opposed to an MCP before or not adequately exposed to the issue prior to the symposium.

### ***Is MCP needed?***

There are two questions that need to be answered in relation to an MCP. One, “is it needed?” and if it is then, two, “is WTO the best place for it to be located?”

On the first point, some developing countries object to an MCP because they perceive it as yet another tool for market access which will benefit multinationals at the expense of consumers and national economies. They suspect that an MCP is the thin end of the wedge and that they will end up having to abandon development policies that support domestic businesses.

There is some basis for these concerns, but they could be dealt with by careful drafting of the agreement to make sure that potentially harmful provisions were not included. Improved market access could also work in favour of developing countries in some sectors where developed-country markets are insulated from competition.

Developing countries could benefit from provisions of an MCP including:

- Increased co-operation and information sharing between competition authorities;
- A formalised obligation by developed countries to provide technical assistance; and
- A commitment that developed countries would consider developing-country interests in the course of their investigations through positive and negative comity.

The agreement would also streamline the merger-approvals process. This would mainly be to the advantage of companies, but could lead to improved efficiency and ultimately to lower prices or innovative products for developing as well as developed economies. There is insufficient evidence available at this stage to be sure that the benefits would be greater than the costs of implementing an MCP. And, while it would seem that the negative effects would be outweighed by the positive, more research on those lines is crucial for an informed debate on the issue.

The second point, whether to place an MCP in the WTO or not, is a subject of heated debate. Within the WTO, member-states are divided into three roughly equal groups:

- those favouring, led by the EU;
- those opposing, including India, Pakistan and others; and
- the undecided countries.

### ***Current proposal***

The current proposal is a statement of core principles on transparency, non-discrimination, procedural fairness and recognition of the ills of hard-core cartels. It would not require developing countries to introduce national competition legislation immediately, nor would it establish a supranational CA or use the WTO Dispute Settlement Mechanism to overturn decisions made by domestic authorities. The draft proposal made by the EU to the Working Group in 2001 also allows for Special and Differential Treatment to developing countries. However, it would put extra pressure on countries to introduce competition.

### ***Developing countries' apprehensions***

Developing countries are resisting these proposals for a number of reasons, mainly their scepticism and distrust of the WTO as an institution. They have lost faith in the WTO system because developed countries have failed to deliver on their promises. Best endeavour clauses in many of the agreements have been ignored and provisions of Special and Differential Treatment for developing countries have been inadequate to protect their interests in the multilateral trading system. The importance of the institution rather than the substance of the policy is reflected in the fact that most developing countries supported making the UN Set<sup>4</sup> binding.

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4 the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

*After the imposition of TRIPs, which has been very harmful to their interests, developing countries are particularly reluctant to enter into negotiations on new issues like competition about which they have little knowledge or experience.*

After the imposition of TRIPs, which has been very harmful to their interests, developing countries are particularly reluctant to enter into negotiations on new issues like competition about which they have little knowledge or experience. Developing countries do not yet understand all the issues that are at stake and should not negotiate until they do so. There is a clear need for more research and studies to be carried out so that developing countries can improve their understanding of competition issues in their economies.

Developing countries have very limited capacity in their trade-negotiating teams and do not have the resources to take on the broad agenda proposed by the EU and others. As Philippe Brusick of **UNCTAD** also opined that developing countries should identify their by interests very soon to prepare themselves for negotiations.

Many feel that the WTO's agenda was already overloaded before the introduction of competition, investment, trade facilitation and government procurement to the Agenda after the Doha Ministerial. There are also concerns that the structure of the WTO system would make it inappropriate for competition policy.

Developing countries need to form a clear idea of what provisions would maximise the benefits and minimise the risks of an MCP to them. Some development-focused provisions are given in the box below and are intended to stimulate further discussion on this important topic.

## MCP provisions with a development dimension

- *No obligatory implementation of national CL:* In many countries, policy-makers and civil society are only just starting to become aware of competition issues. They do not yet have a clear idea of how their national competition challenges may best be met. While there are strong reasons for implementing national CL, some countries may prefer to take a regional approach or may not at present have the resources to devote to the effective implementation of CL. The national legislature may have other priorities central to the country's development strategy. For all of these reasons, the MCP should not require that developing countries implement a national CL.
- *No harmonisation of CL provisions:* There is no 'one size fits all' in CL. Countries will have different needs depending on their size, economic, political and social characteristics and development strategies. CL should be designed carefully to meet these needs.
- *No restrictions on the provisions of national CL:* To fit in with the national development strategy, countries may wish to include certain exceptions and exemptions into their laws. Other countries may have an interest in the withdrawal of these provisions for market access reasons and, hence, may try to exert pressure on them through the WTO forum. The MCP should not contain any restrictions on national legal provisions and national CL provisions should not be part of the WTO bargaining.
- *Appropriate dispute settlement mechanism (DSM):* The DSM should consider disputes on transparency, fairness and adherence to core competition principles in national laws only and should not stretch beyond. The body would also need to have the capacity to engage in its own investigations.
- *Provisions for technical assistance:* In order to get to the stage where all developing country and least developed country WTO members can make use of an MCP, these countries need to build their own capacity. Very few of these countries have much knowledge of and experience in competition issues and they need to build up their skills and know-how. There will, therefore, be a need for ongoing technical assistance, including general and targeted training programmes<sup>5</sup>.
- *Information sharing without strict reciprocity:* Developing country CA will only benefit from an MCP if it improves their access to information from the authorities of developed countries. To facilitate the same, a mandatory system of exchange of information may be developed by putting forward all the enquiries made in the CA, whether dealt with or not. However, information sharing in the opposite direction could be a burden and divert resources away from more urgent uses.
- *Positive comity without strict reciprocity:* Positive comity requires an authority to consider the requests of another national authority under its own laws. This could be very useful for developing countries.
- *Distribution of fines:* The MCP should contain a mechanism for the distribution of fines for cartels and other anti-competitive practices across all the affected countries.

<sup>5</sup> There are currently a number of training programmes being funded by donors and international organisations such as the World Bank, DFID, IDRC, UNCTAD, OECD, EU, USAID, AUSAID, etc., to inform policy-makers about the issues involved, to raise awareness in civil society and to train officials in the necessary disciplines to implement CL. While these training programmes are addressing an urgent need, there is very little co-ordination between donors and there is a danger of overlap in some areas and gaps in others. It may also be difficult for a developing country to identify the most appropriate training programmes from the plethora of those available. This situation needs to be tackled by donor agencies in co-operation with one another.

## Recommendations

### For Developing Countries

- Enact a competition law;
- Put consumer welfare at the heart of the law;
- Include provisions relating to the international dimension;
- Ensure adequate resources are available for implementation;
- Create a strong independent authority;
- Give the new authority political support at the highest level;
- Enact a consumer law;
- Ensure that there is a clear demarcation of roles between different government bodies;
- Ensure consistency between policies and laws; and
- Explore international co-operation.

### For Consumer Organisations

- Be a nuisance to the government, the CA and companies;
- Carry out preliminary investigations and be a catalyst for action;
- Reach out to the public with examples they can understand;
- Create awareness through the media of the need for a competitive economic environment that includes traditionally protected sectors;
- Consider the international dimension. With an increasing number of consumer products (services as well as goods) being provided across borders or by multinational companies, consumer groups cannot afford to maintain this narrow perspective; and
- Explore international co-operation with other consumer organisations and NGOs.

### For Developing Country CAs

- Use national law where possible for international competition abuses;
- Seek out all sources of information, including whatever is publicly available;
- Seek informal or formal co-operation agreements, where possible;
- Ensure that the CA is able to keep information confidential;
- Pursue regional arrangements, where possible; and
- Explore international co-operation.

### **For the International Community**

- Conduct research and studies to investigate developing countries' competition needs and the likely impact of an MCP on developing countries;
- Providing training and financial assistance to the developing countries;
- Consider whether the WTO is the most appropriate place for an MCP and if other options, such as UNCTAD or a free-standing World Competition Forum, could meet global needs better; and
- Explore international cooperation.

## Rapporteur's Report

### Competition – Varying Perceptions

- What is 'competition'?
- How does it fit culturally?
- Has 'competition' got a bad name?
- Has the International Monetary Fund (IMF)/World Bank (WB) push undermined the cause?
- Should we stop talking about competition policy and focus on anti-monopoly, anti-trust, anti-cartel, fair trade and monopoly regulation?
- Does the language used also reflect interests?

*At the symposium, it was notable that the East Asian and African delegates, in particular, tended to view competition policy with great suspicion.*

It was clear from the discussion among the assembled group that the term 'competition' carried mixed meanings. We were reminded that when the term was first translated into Japanese, the term became 'fighting with each other to succeed'. This meaning was immediately greeted with a belief that actually you succeeded by co-operating. In this light, competition never really fitted into the cultural milieu of turn-of-the-century Japan. At the symposium, it was notable that the East Asian and African delegates, in particular, tended to view competition policy with great suspicion.

A good deal of confusion occurred when trying to dissect the relationship between economic competition and competition policy. In this light, the term 'competition' tended to have become associated with liberalisation and deregulation and, in turn, that these terms had become sullied by the 'false liberalisation' that had blighted many developing countries. These false liberalisations occurred when public monopolies were privatised into private monopolies, without the relevant regulatory structures being put into place.

With the confusion of terms and sullyng of the policy by poor WB/IMF design, it was suggested that we might bypass some of the problem by using different language to discuss the problem. In this light, it was notable that many competition agencies in developing countries and the laws that they administer were called anti-monopoly authorities, fair trading organisations and the like. Similarly, many laws were anti-monopoly laws and fair trading



laws. This was unlikely to be a coincidence and the experience indicated just how important language was in the discussion of policy options.

### **What and how the Toolkit should be?**

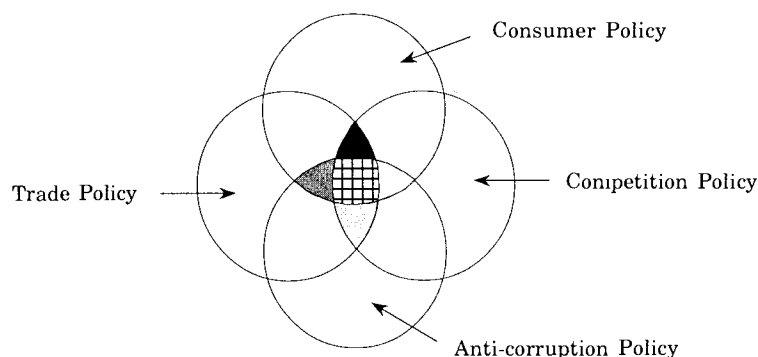
- Nuts and bolts need spanners – not screwdrivers;
- Different nuts need different spanners – size and shape;
- The relationship between competition policy and other related policies: Consumer policy, corruption, trade and regulation;
- What competition policy is and what it is not?

*An analogy was used to illustrate the fact that we needed to think of competition policy as part of the regulatory toolkit; it was very good at some things, but could not deliver on every social goal.*

Another confusion in the discussion centred on what competition policy and law could do and what they could not. The analogy of a toolkit was brought into play. It was pointed out that when assembling a cabinet (one of those flat packed ‘do-it-yourself’ ones which is assembled with various sizes of nuts and bolts, which come along with the DIY kit) one uses a spanner. Depending on the size of the nuts and bolts to assemble the cabinet, one uses different sized spanners. One will not use a screwdriver because there are no screws to be put in. Furthermore, if there are screws involved, one may use an electric screwdriver, which will be more efficient than a manual one. But one cannot use a screwdriver to tighten nuts!

The analogy was used to illustrate the fact that we needed to think of competition policy as part of the regulatory toolkit; it was very good at some things, but could not deliver on every social goal. Like the market, competition policy was good at delivering on greater efficiency, but was lousy at other things – most notably the distribution of benefits within society. We needed to be clear that we were using competition policy for the right job and that we were neither seeking to use it to solve all our problems nor seeking to blame it for problems that had nothing to do with it.

In this regard, it was important to look at the interface of competition policy with other closely related parts of the regulatory toolkit. Here it was important to see the relationship between competition policy and three major related policy areas: consumer protection, trade policy and anti-corruption policies. A Venn Diagram was exhibited to the symposium that tried to map the relationships and the important areas of overlap.



As was clear from the meeting, the relationship between competition and consumer policies was, perhaps, the most important one. Consumer policy covered a much broader canvas of approaches and tools than competition policy did, and it was the key to see competition in this regard.

The relationship between trade and competition policy was seen as primarily being one of ensuring that the benefits of trade liberalisation were passed on to consumers through effectively operating markets, rather than allowing them to be captured by anti-competitive behaviour or agreements. The difficult area of bid-rigging sat between anti-corruption policies and competition laws.

It was clear from some of the discussions around the 7-Up project<sup>2</sup> that different regimes dealt with bid rigging in different ways. For some it was part of a criminal anti-corruption regime, for others part of a competition regime. What was important was not so much that different regimes dealt with the issue differently, but that the policy was seen to sit in the overlap between the two, capable of being dealt with by either.

*As was clear from the meeting, the relationship between competition and consumer policies was, perhaps, the most important one. Consumer policy covered a much broader canvas of approaches and tools than competition policy did, and it was the key to see competition in this regard.*

In some ways, the most important of the policy relationships was between competition policy and sectoral regulation (generally utilities, such as telecom, electricity, water etc). Competition policy was not directly equated with a liberalisation and privatisation policy, as discussed before. The role of sectoral regulation as a proxy for competition policy was the key, and the transition and relationship between the two was important.

### Competition Concerns in Small Economies

- Are the problems different?
- Do they have cartels, abuse of dominance – or in a different way?
- Are the solutions different?
- Stripped down policies and bodies?

A good deal was made during the discussions and presentations of the problems of small economies in dealing with anti-competitive practices. The problem was not just that small economies suffered abuse at the hands of very large trans-national corporations, but that their economies tended to be dominated by large domestic incumbents. However, it was not at all clear from the discussion whether the problems of small economies were necessarily different from those of larger economies, or whether they were just exaggerated. Similarly, if the problems were essentially the same, but larger, it was not clear whether the solutions were necessarily different.

A number of potential differences in drafting and enforcement mechanisms were discussed in the meeting. The example of Bhutan (see pg-6) appeared useful in this regard. The use of more general communal pressure and publicity in very small communities was also voiced as very useful in curbing unfair practices.

*A number of potential differences in drafting and enforcement mechanisms were discussed in the meeting.*

There was also an important issue of enforcement resources and whether a stripped down version of competition policy was preferable to a full-blown law, if enforcement resources were limited. Perhaps the key issue to resolve in this regard was whether the competition problems (both in terms of abuses and solutions) were diverging from or converging on the experiences of other economies. Once this issue was resolved, it would be clearer whether smaller economies needed to adopt policies similar to advanced economies in anticipation of converged problems and solutions, or search for an alternative model.

### **Administration and People**

- Leadership: Hegel's revenge – great people are needed to change things
- Importance of keeping focus on consumers

There was a good deal of debate about whether it was important to have good laws in place, or to have the right sort of people in charge of competition agencies. What became clear in the discussion was that what was needed was actually a combination of good drafting and effective leadership. It was impossible to get away from the fact that leadership really did matter - this was the argument about Hegel's revenge.

The Hegelian theory of history argued that history was advanced only through the actions of great men (always men at that time!) rather than broader social forces. To some extent, it had to be recognised that competition law and policy was best advanced through the efforts of 'great' people - i.e., the leaders of competition agencies. However, such leadership was not much use if the laws and institutions were not in place to deliver real benefits to consumers.

## **The Trends and Challenges**

- More liberal environment;
- Lower barriers, greater capital mobility and greater integration – both internationally and regionally;
- Dominance through FDI;
- Incumbent anti-competitive reaction;
- International effect;
- Exposure of existing cartels;
- Creation of new cartels; and
- Wider effect of mergers.

One of the key discussions that ran through each session was focused on the key trends pulsing through the world economy. The list of key policies included the more liberal environment generally operating in the world economy; both in terms of more liberal policies and in a more liberal approach to the philosophy of regulation. These more liberal policies included, generally, lower barriers to trade and market entry and a trend towards greater integration of economies. A question arose over whether this more liberal approach would create new competition problems by creating dominance through foreign direct investment; or whether it would create new problems simply by bringing in a more effective abuser of monopoly power! Against this had to be balanced the issue of incumbent response.

We heard from a number of participants about the ability of incumbent firms to react to potential or real new entry through blockading tactics. The tendency of lower barriers to increase the cross-border impact of mergers and anti-competitive agreements and activities was also noticed. A further trend of note related to cartels. It was noted that cartels appeared to be increasingly likely to be exposed by investigating agencies. However, it was not clear if the liberalisation process was actually increasing the number of cartels and facilitating their exposure, or simply making them easier to find.

Lastly, the wider effects of mergers was also raised in the discussions, and how developing countries may find it difficult to cope with them.

## **The International Dimension**

- Are there competition issues of an international nature (mergers, abuse of dominance, cartels, and market division)?
- Are there trade dimensions specific to them?
- Do they harm developing countries in particular?

The impact of the international aspect of competition policy was both a specific discussion and a constant theme throughout the

meeting. The key questions seemed to boil down to the need to identify specifically international dimensions to competition problems, whether there were trade elements to them and whether developing countries were harmed in any particular way as a result. The discussion seemed to point to the affirmative in all the areas.

There was clearly a specifically international dimension to the competition 'problem'. The operation of cross-border cartels was the most obvious and egregious example of this. The trade dimension was clear once you viewed the problem from the international dimension 'down', as it were.

The position of developing countries in relation to international competition problems was a key topic of debate. Due to a lack of enforcement at the national level in many developing countries, it was not always clear that the country was particularly disadvantaged. The view that developing countries were disadvantaged came particularly from a combination of the limited cartel evidence that existed and the view deduced from the evidence in cartel cases, that cartels and abusive practices were most likely to be targeted at countries where the market was most important and where the enforcement ability of the country was weakest.

*Due to a lack of enforcement at the national level in many developing countries, it was not always clear that the country was particularly disadvantaged.*

### **What are the Solutions?**

- Domestic – right size of the nuts and the spanners;
- Bilateral – can be good but unbalanced;
- Regional – good track record in Europe;
- Multilateral – great promise but many hurdles; and
- The Pirandello problem: Six authors in search of a story – six problems in search of a solution.

The participants pointed to a number of possible solutions to the 'problems' faced by countries dealing with anti-competitive practices. What became clear was that the approach that was needed involved dealing with the right problems at the right level. The difficulty here was identifying the fit between levels and policies.

For all economies, but particularly for smaller economies, one of the key questions related to the size of the problem being dealt with and the tools available to the country. The problem was not open to a standard solution and there were no 'off the peg' answers that could be applied. The solution could only come with a rather pragmatic assessment by the country concerned about the best way forward. This depended a lot on the ability of the country to pursue the policy agenda and the likelihood that a regional solution may also be available.

*The proposals put forward in the WTO Committee on Trade and Competition Policy had promise – but progress was not guaranteed.*

On the sort of solutions available for countries, there appeared to be three key approaches for co-operation. The bilateral route was probably the easiest – in terms of negotiation. However, power imbalances between parties and the likelihood that a big developed country would respond in a timely fashion to co-operation requests from a number of developing countries had to be taken into account.

The regional route had a good track record in Europe. However, the example of Europe was viewed as being fairly unique, and its applicability to developing countries was questionable at the very least. The regional approach was thus best tailored to the reality of developing country co-operation, rather than tested against the European experience.

The multilateral approach was viewed as potentially offering great promise. However, while the potential pay-off was high, it was not clear how successful the process might be. The proposals put forward in the WTO Committee on Trade and Competition Policy had promise – but progress was not guaranteed.

The fundamental problem for all policy-makers boiled down to what was termed the ‘Pirandello Problem’. Pirandello wrote a play called ‘six characters in search of an author’ and much of the international competition ‘problem’ seemed to centre on six problems (such as cartels et al) in search of a solution.

### **What Countries need to do?**

- Enact a competition law;
- Make the consumer their focus;
- Incorporate consumer bodies within the governing board of the agency; and
- Enable consumer representatives to sue firms engaged in anti-competitive acts.

*While it was clearly important for consumer organisations to focus on what they needed to do to promote the interests of their constituency, it was also important to focus on what governments needed to do.*

While it was clearly important for consumer organisations to focus on what they needed to do to promote the interests of their constituency, it was also important to focus on what governments needed to do. This would provide an agenda for change for consumer organisations to focus on.

Firstly a country clearly had to implement a competition law and/or policy. This was a pre-requisite for dealing with many of the problems being faced. Secondly, the focus of the law and the institution needed to be the consumer. It was clear that the public acceptance of competition policy was central to its success and the role of the consumer movement was important here. Incorporating consumer organisations into the governance structures of the

competition agencies and enabling them to take private actions against those engaged in anti-consumer practices was also important.

### **What can Consumer Organisations do?**

- Be a nuisance – to firms, to regulators and to governments;
- Be an advocate at all levels;
- Make it real to consumers;
- Focus on what matters to them;
- Operate at all levels; and
- Don't be parochial when an international view is needed and vice versa!

*While the consumer movement is firmly rooted in its community, it needs to raise its eyes from the local and deal with the global, when necessary.*

As many of the participants in the debate were consumer organisations, we needed to think about what it was that they could do. It was simply not enough for consumer organisations to cede all responsibility for dealing with the problems to regulators and governments. Given the impact of anti-competitive behaviour on consumers, there was a clear responsibility for consumer organisations to get their act together. The key roles for consumer organisations include being a nuisance and raising the issues before the public, politicians and regulators. There is also a need to push competition issues and be an advocate for competition laws and policies. This must be done at all levels, national, regional and international.

One of the most important jobs centred on making the issues in competition investigations and discussions real to consumers. Consumer organisations should not continue to operate as some form of priesthood that discussed these issues solely among themselves to the exclusion of the public. One of the main attitudes that needed to be addressed was that consumer organisations had to ensure that they did not focus entirely on the national, when the international view was more appropriate and vice versa. While the consumer movement is firmly rooted in its community, it needs to raise its eyes from the local and deal with the global, when necessary.

### **Conclusion**

- The language;
- The tools;
- The 'problem' of small economies;
- Administration and people;
- The trends and challenges;
- The solutions; and
- The role of consumer organisations.

In conclusion, the debate in the conference appeared to boil down to the following important points:

*It is important to be careful about the language that is used – there was no universal acceptance outside of the competition community about the common language used to describe competition problems.*

It is important to be careful about the language that is used – there was no universal acceptance outside of the competition community about the common language used to describe competition problems. Indeed, the language used to convey ideas may cause more problems than the ideas themselves. This was particularly clear in the discussions of the East Asian experience.

The tools available to competition regulators and consumer organisations needed addressing. This was not a check-box operation but was central to the ability of regulators and consumer organisations in doing their jobs.

It was clear from the conference that smaller economies faced particular problems. However, it was not clear whether the problems were actually different, or whether they were simply of a different scale. This distinction was important, if applicable solutions were to be developed for those economies.

It was also clear from the discussion that the right people and the right laws were not an either/or choice. It was important to have good, sound rules, but it was also clear that having the right people to implement those rules was important. It would not work if there are good laws but no good people to implement, and vice versa.

The background to the discussion about competition and trade policy presented a particular challenge. There were specific economic and political trends surging through the world economy and these had to be both recognised and dealt with in the process of formulating competition policies. The lowering of barriers and opening up of markets presented a boost to transparency in economies as well as ever-more routes to abuse for firms engaged in, for example, cartels. The direction of the world economy was important to take into account when drafting the most appropriate rules for the game.

*It was important to have good, sound rules, but it was also clear that having the right people to implement those rules was important.*

The discussion centred on the need for flexibility in the manner in which these problems were dealt with. There was no ‘off the peg’ solution available and the application of one would be counterproductive. Imagination and flexibility were the key terms in moving the agenda forward.

There appeared to be no doubt that an international dimension was present in competition policy problems. However, there was considerably less agreement on the right way forward or the right forum for dealing with the issues raised. However, a good deal of the debate seemed to centre on a suspicion of motives and general



attitude toward institutions rather than a specific opposition to the idea of discussions and/or negotiations.

Finally, it became clear that consumer organisations had an important role in taking forward the agenda on competition policy. Consumers were the obvious natural allies for competition officials and policies. This needed to be both recognised and built upon. A major part of this job involved consumer organisations making competition policy more of a priority area.

## CUTS' PUBLICATIONS

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### ***I. Monographs on Investment and Competition Policy***

1. **Role of Competition Policy in Economic Development and The Indian Experience**  
Competition and efficiency are the guiding principles of the liberal economic order. Any healthy competition must have rules that the players should follow. This is more so when the players are business organisations and their activities will have a larger impact on the society. This monograph examines the role of an effective competition policy in economic development from the Indian perspective. (32pp #9908 Rs.15/\$5)
2. **FDI, mega-mergers and strategic alliances: is global competition accelerating development or heading towards world monopolies?**  
Foreign Direct Investment, mergers, amalgamations and strategic alliances are the rules of the present day global economy. However, the crucial question is whether the movement of capital leads to further development and welfare of the society or the growth of monopolies. The monograph sheds light on the main contours of the global competition and its implication for the consumers. (24pp #9909 Rs. 15/\$5)
3. **Competition Regimes Around the World**  
In this paper, an attempt has been made to comply briefly, the current state of Competition Law in some select countries, on which information is readily available. The paper steers clear of any value judgements on the design and implementation of the Competition Law in the countries covered herein. (40pp #2002, Rs.20/\$5).
4. **Globalisation, Competition Policy and International Trade Negotiations**  
This paper maps out the issues concerning multilateral competition policy, from southern perspective. It concludes that there is a need for a realistic assessment of the Extent to which developing countries would be able to control MNCs under the disciplines of competition law. (38pp #2003, Rs.20/\$5).
5. **Trade, Competition & Multilateral Competition Policy**  
As the title suggests, this monograph clarifies the areas of interaction between trade and competition through case studies, and shows that such interactions are on rise. It also highlights efforts being taken for a multilateral competition policy after Second World War in form of Havana Charter till the present happenings at the World Trade Organisation. It further points out the provisions in various agreements of the WTO acquis, which have the elements of competition. Most importantly, the paper brings forward the debate vis-à-vis multilateral competition policy that is currently taking place at various fora. It analytically points out the hindrances in such a policy and highlights the need for a multilateral competition policy. (36p #0005, Rs.20/\$5).
6. **All About Competition Policy & Law**  
This monograph meant for advance learner, deals with various elements of competition law and policy in comprehensive manner. It describes about various restrictive business practices (RBPs) at the market place. It further clarifies what are competition law and policy, their elements and how they can be used to curb various kinds of RBPs. It further draws out interface of competition policy with economic development, poor and foreign investment. Finally it describes the genesis of competition law/policy and in which direction it is moving. (70pp #0006, Rs.20/\$5).
7. **All About International Investment Agreements**  
This briefing kit for the general reader provides an overview of recent trends in the proliferating number of bilateral and regional investment agreements. The kit highlights the key issues in these agreements and considers past initiatives and prospects at the multilateral level. (64pp #0102, Rs.20/\$5)

## 8. Competition Policy & Law Made Easy

This publication meant for the activists, aims at generating minimum amount of awareness on competition law and policy. It could be helpful for a common person to identify anti-competitive practices in the market place and take action to rectify the same. (36pp. #0109, Rs.20/\$5)

## 9. Making Investment Work for Developing Countries

This monograph, intended for everyone interested in investment issues, looks at the impact of Foreign Direct Investment in developing countries, pointing out both beneficial and harmful aspects. The study also looks in detail at the kind of policies that governments can adopt in order to maximise the benefits from FDI, covering the institutional set-up as well as targeted investment policies. (44pp. #0110, Rs.20/\$5)

## II. Event Reports

### Liberalised Trade & Fair Competition

A report of the IOCU-CUTS International Conference on Competition Policy in the Context of Liberalisation, New Delhi, 20-21, January, 1995 containing 19 papers from eminent competition practitioners and economists from all over the world. The recommendations include calling upon the WTO and UNCTAD to develop work programme on trade and competition and governments to involve public interests groups in policy making. A good documentation for anyone interested in trade and competition issues. (144pp #9501 Rs.100/US\$25)

### The UN Code of Conduct for TNCs: Why it collapsed...The Way Ahead

Evidence submitted at the Permanent Peoples' Tribunal, London, November, 1994. Contains a statement with supporting enclosures which include several original documents. An extremely good resource material for anyone interested in the issues of regulation of global business. (#9401 Rs. 30/US\$ 15)

## Investments: Consumers, Development and the Environment

A report of the CI-CUTS International Seminar on Multilateral Frameworks for Investment, Geneva 18-19 October, 1996. The report contains 10 papers from eminent experts of different viewpoints. The report covers issues concerning investment liberalisation and its impact on consumer, development and environment. A must reading for those following international investment agreements. (93pp #9602 Rs. 50/US\$ 15)

## III. Discussion Paper

### Multilateralisation of Sovereignty: Proposals for multilateral frameworks for investment

The paper written by Pradeep S Mehta and Raghav Narsalay analyses the past, present and future of investment liberalisation and regulation. It also contains an alternative draft International Agreement on Investment. (#9807, Rs.100/\$25)

## IV. Study

### Analyses of the Interaction between Trade and Competition Policy

This not only provides information about the views of different countries on various issues being discussed at the working group on competition, but also informs them about the views of experts on competition concerns being discussed on the WTO platform and the possible direction these discussions would take place in near future. It also contains an analyses on the country's presentations by CUTS. (\$25/Rs.100) ISBN 81-87222-33-6

## V. Briefing Papers

1. Competition Policy In A Globalising And Liberalising World Economy
2. Competition Regime in India: What is Required?
3. Globalisation: Enhancing Competition or Creating Monopolies?
4. Trade, Competition & Multilateral Competition Policy
5. Contours of A National Competition Policy: A Development perspective

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## *Survey Results\**

1. Do you think that competition policy and law at the national level are important for consumer welfare?

Necessary	Needed with pre-conditions
96%	4%

2. Did your views on this change in any manner as a result of the Symposium?

Fully	Reinforced	Partially	Not at all
24%	44%	12%	20%

3. Do you think that it is necessary for developing countries to have a national competition law?

Necessary	Needed with pre conditions	Not needed
60%	36%	4%

4. Do you think that it is necessary for developing countries to have a national consumer protection law?

Necessary	Needed with pre conditions	Not needed
80%	16%	4%

5. Do you think that a multilateral competition policy would help small countries and their consumers?

Yes	Not Sure	No
60%	20%	20%

\* Based on the responses of the participants of the symposium, "Competition Policy and Consumer Interest in the Global Economy" on 12-13 October 2001, Geneva.

6. Do you think that developing countries should support an MCP at WTO?

Yes	Not Sure	No
56%	16%	28%

7. Did your views on MCP change as a result of the symposium?

Yes	Reinforced	No	Already in favour of MCP
24%	24%	28%	24%

8. Do you feel the need of any such meeting?

Yes	No
96%	4%

कट्स ✕ CUTS

**Cuts Centre for International Trade, Economics & Environment**

D-217, Bhaskar Marg, Bani Park, Jaipur 302 016, India

Ph: 91-141-207482, Fx: 91-141-207486

Email: [cuts@cuts.org](mailto:cuts@cuts.org), Website: [www.cuts.org](http://www.cuts.org)